



## Pashtunwali—Law for the lawless, defense for the stateless



Bruce L. Benson<sup>a,\*</sup>, Zafar R. Siddiqui<sup>b,1</sup>

<sup>a</sup> Department of Economics, Florida State University, Tallahassee, FL 32306, United States

<sup>b</sup> Askew School of Public Administration and Policy, Florida State University, Tallahassee, FL 32306, United States

### ARTICLE INFO

#### Article history:

Received 14 October 2012

Received in revised form 26 June 2013

Accepted 17 July 2013

#### Keywords:

Customary law

Pashtunwali

Retribution

Restitution

Asylum

Mediation

Badal

Thega

Melamastya

Nanawatey

Panah

Jirga

### ABSTRACT

Despite a large and growing literature on systems of law without coercive central authority, the overwhelmingly dominant view remains that law, as a public good, must be produced by the state. Defense against attempts to subjugate a community is even more widely viewed as a public good and therefore a necessary function of the state. This case study of the *Pashtunwali* – the customary law followed by the ethnic *Pashtun* tribes in Afghanistan and Pakistan – illustrates that both law and community defense can be effectively produced without the institutions of a state. The incentives created under *Pashtunwali* have provided the *Pashtun* with a decentralized system for maintaining order within and between the tribes for several centuries without the authority of a coercive state. In addition, they have generated a system of spontaneous decentralized defense that has allowed the *Pashtun* to retain/regain their independence from the states that have tried to colonize or subjugate them for centuries.

© 2013 Elsevier Inc. All rights reserved.

### 1. Introduction

The *Pashtunwali* or “way of the *Pashtun*” – the customary law<sup>1</sup> followed for centuries, and still followed by ethnic *Pashtun*<sup>2</sup> tribes which straddle the mountainous region between Afghanistan and Pakistan – is examined, focusing on four main provisions

of this law: *Badal*, *Thega*, *Melamastya* and *Nanawatey* (including *Panah*, an element of *Melamastya* that links it to *Nanawatey*).<sup>3</sup> Widespread acceptance of these provisions provides the *Pashtun* with a relatively effective decentralized process for maintaining order within and between the tribes in the absence of an authoritarian state,<sup>4</sup> while also supporting their centuries-old and largely successful efforts to maintain their independence from state authority. This success includes recent efforts to impose

\* Corresponding author.

E-mail addresses: [bbenson@fsu.edu](mailto:bbenson@fsu.edu) (B.L. Benson), [zrs07@fsu.edu](mailto:zrs07@fsu.edu) (Z.R. Siddiqui).

<sup>1</sup> *Pospisil* (1971) labels “legal” arrangements with rules and procedures imposed from the top down through command and coercion as “authoritarian law,” while a system of rules and procedures that spontaneously evolve from the bottom up through voluntary interaction is “customary law.” Customary rules are described by *Hayek* (1973, pp. 96–97) who explains that many issues of “law” are not “whether the parties have abused anybody’s will, but whether their actions have conformed to expectations which other parties had reasonably formed because they corresponded to the practices on which the everyday conduct of the members of the group was based. The significance of customs here is that they give rise to expectations that guide people’s actions, and what will be regarded as binding will therefore be those practices that everybody counts on being observed and which thereby condition the success of most activities.” Indeed, customary behavioral rules in a community include both “immemorial custom” and evolving practices and usage. Customary governance procedures correspond to *Hart’s* (1961) secondary rules or institutions of recognition (shaming, ostracism, retribution, restitution), adjudication (mediation, arbitration), and change (contracting, adjudication, emulation), but they also evolve spontaneously without top down coercion (*Benson*, 1989, 1990).

<sup>2</sup> Other common spellings include *Pakhtun*, *Pukhtun*, and *Pathan*.

<sup>3</sup> *Badal* is an obligation to seek proportional retribution. *Thega* is a temporary truce declared by a *Jirga* (an assembly of tribal elders). *Nanawatey*, can be described as repentance for offenses, sometimes accompanied by a request for asylum, *Panah*. *Melamastya* refers to hospitality or ‘welcoming the guest,’ including *Panah*, protecting the guest even at the cost of one’s own life.

<sup>4</sup> *Weber* (1964, p. 154) defines a state as a monopoly on the legitimate use of violence in a given territory. A consistent but perhaps narrower definition (*Claessen*, 1996, p. 1255) is “an independent, centralized socio-political organization for the regulation of social relations in a complex, stratified society living in a specific territory, and consisting of two basic strata, the rulers and the ruled, whose relations are characterized by political dominance of the former and tax obligations of the latter, legitimized by an at least partly shared ideology...” (also see *Stringham & Miles*, 2012). In this context, the influence of *Pashtunwali* varies between the *Pashtun* living in urban areas and those living predominantly nomadic lives in the mountains. Large landowning and urban *Pashtun* are referred to as *qalang* or the ‘tax’ group; whereas the nomads are often characterized as *nang* or the ‘chivalrous’ group (*Ahmed*, 1976). As explained below, honor and generosity (chivalry) are key elements of customary law.

government on the *Pashtun* by the British who attempted to colonize the territory, the Pakistani state, and the Russian-backed (and probably the NATO/US-backed) government in Afghanistan.<sup>5</sup> In other words, this decentralized system has produced both law and defense—probably the two services most widely characterized as public goods.

The overwhelmingly dominant view (assumption) in both the legal and economics literatures is that law and defense are public goods requiring production by coercive government. While stateless systems of defense have attracted very little discussion in these literatures,<sup>6</sup> the view that states must be the source of law continues to dominate despite a growing literature on stateless production and enforcement of rules and maintenance of order.<sup>7</sup> Therefore, the economic underpinnings of four key provisions of *Pashtunwali* are examined below in order to explain how the *Pashtun* have maintained both order and independence without a coercive state. This is a positive analysis of the institutionalized incentives underlying a long history of internal order and community defense.<sup>8</sup> Aspects of this system that are not directly relevant to these two issues are not considered. Furthermore, no normative conclusions about the system or its rules are intended. The primary purpose simply is to illustrate that the “assumption” that provision of these ‘public goods’ require centralized coercive power (i.e., a state) is not always appropriate. Under some institutional environments, incentives for individuals and groups to spontaneously cooperate in the provision of these services arise without employing the coercive power of the state.

This analysis is informed by descriptive research from Anthropology, History, International Relations, International Security and other academic disciplines, information from British accounts of their colonization efforts, and popular press discussions of current events. Importantly, multiple interviews of people from Pakistan with intimate knowledge of *Pashtun* tribal life were also conducted.<sup>9</sup>

A brief description of the *Pashtun* tribes and the area they occupy is provided in Section 2, with special attention to the

Federally Administrated Tribal Areas (FATA), the focus for much of the discussion of current applications of *Pashtunwali*. Section 3 explores the four key provisions of *Pashtunwali* that support their non-centralized system of legal order—*Badal*, *Teega*, *Melamastya*’ (including *Panah*), and *Nanawatey*. The economic rationale behind these provisions is also discussed, and their similarities to provisions in other customary law systems are noted. Section 4 explains why these same provisions provide the incentives that underlie centuries of effective resistance by the *Pashtun* to colonization and subjugation. Conclusions are offered in Section 5.

## 2. The *Pashtun* and FATA

The *Pashtun* tribes inhabit one of the most inhospitable terrains in the world<sup>10</sup>—a forbidding landscape of towering mountain ranges, narrow valleys and rocky barren wasteland.<sup>11</sup> This area includes the FATA discussed below, and much of the rest of western Pakistan, as well as roughly half of Afghanistan, particularly in the south and east.<sup>12</sup> The map in Fig. 1 (adapted from Curtis and Phillips (2007)) shows the *Pashtun* tribal areas on both sides of the Durand Line (the boundary line that the British created between Afghanistan and Pakistan which split the *Pashtun* population between the two states). *Pashtun* in sizable numbers also live in Pakistan’s urban areas, but the focus here is on the predominantly rural *Pashtun*. In fact, the primary focus is on the *Pashtun* in the FATA.<sup>13</sup> In this context, it must be noted that this label actually is a misnomer, as these tribal areas have never been effectively governed or “administered” by any Pakistani regime (or the

<sup>10</sup> It is important to recognize this for reasons suggested by Scott (2009) and discussed below.

<sup>11</sup> They have occupied the area since before recorded history.

<sup>12</sup> Almost half the population of Afghanistan is *Pashtun*, and some are much more involved in the Afghan government than are the FATA *Pashtun* with the Pakistani government. Indeed, the current Afghan President is *Pashtun* and there was a *Pashtun* Kingdom in Afghanistan after 1747. However, “The Kingdom of Afghanistan was an Empire of the *Pashtuns* over the other territories and ethnic groups; the role of its King and government was only to govern the foreign, non-*Pashtun* territories it had captured, but not the *Pashtun* territories themselves. The internal affairs of the *Pashtun* tribes were solely a matter for their own chiefs and tribesmen, not of the king or government. ... (and these tribes applied) *Pashtunwali*, or the usage of the *Pashtuns*” (Omani, 2007). The first King to make a serious attempt to centralize power and create a strong kingship was Amir Abdur Rahman (1880–1901). He also tried to impose Islamic law and established *Shari’a* courts. In his attempt to establish central authority over “criminal law” beatings and torture were common practice, both as part of interrogations and as punishment. Prisons, which had no role under *Pashtunwali*, were created. Heavy taxes on the poor agriculturalists, craftsmen, and merchants were imposed, while money was also confiscated from the wealthy so the Amir could pay his army; this drove away trade and stifled business. Revenues actually declined, as resistance was widespread and it continued to intensify after his death in 1901. One of his successors to the throne was assassinated, for instance, and ultimately in 1925 a widespread uprising by the *Pashtun* mountain tribes drove the sitting king into exile. The Taliban, who ruled in Afghanistan before the NATO/US invasion, are also *Pashtun*. They rose to power after the war against Russian occupation. They had been one of the *mujahideen* armed and supported by the U.S. and other western powers to fight against the Russians and their puppet government. Once they came to power, the Taliban also attempted to impose Islamic law within Afghanistan. The point of this discussion is that for more than a century Afghanistan has been subject to repeated internal attempts to centralize power and impose Islamic law and this process is still playing out. NATO/US efforts to establish aspects of western law (e.g., democracy) are also underway. Therefore, the focus of the following presentation is on the FATA *Pashtun* who have been relatively, although certainly not absolutely, free from such efforts. In addition, as noted above, interviews that inform our analysis primarily reflect direct knowledge of a major tribe in the FATA, and we cannot be positive that this information also characterizes Afghan *Pashtun* after the turmoil of the last century plus. It may, of course, and almost certainly does for much of the rural nomadic population. Indeed, Ahmed and Zahori (2013) contend that: “Even in Kabul, one of the most liberal cities in Afghanistan, many young men and women ... consider democracy a tool of the West. And the vast majority of Afghans still rely on tribal justice, viewing the courts as little more than venues of extortion.”

<sup>13</sup> See note 12.

<sup>5</sup> Virtually all of the press coverage and NATO/US reports about the war in Afghanistan focus on the role of religious beliefs of the Taliban and other insurgents. We do not deny the importance of religion in the conflict, but we do not examine this issue here, choosing instead to emphasize the much less widely recognized and understood consequences of *Pashtunwali*.

<sup>6</sup> There is a substantial anthropological literature on inter- and intra-tribal warfare, but the focus here is on the tribes resisting outsiders, a topic that has not attracted much attention even in anthropology. Scott (2009) is an important exception. He demonstrates that *Zomia* in upland Southeast Asia have resisted rule by states for thousands of years. Stringham and Miles (2012) expand on Scott’s work. While the explanations offered by Scott and Stringham–Miles for the long history of effective resistance by the *Zomia* appear to apply to the *Pashtun* too, as explained below, our focus is on the key aspects of customary law that simultaneously provide processes for maintaining internal order and for effective defense.

<sup>7</sup> The impetus for the growing interest in studying actual cases of order without the state (as opposed to theoretical analysis of the potential for stateless order) in the legal literature is often traced to Ellickson (1989, 1991), while Benson (1988, 1989, 1990) and Greif (1989, 1993) have been suggested as initial stimuli for similar studies in economics. However, several other examinations of such arrangements appeared in the legal and economics literatures before (e.g., Rothbard, 1970, 1973; some of the contributions to Tullock, 1972, 1974; Friedman, 1973, 1979; Anderson & Hill, 1979; Landa, 1981; Berman, 1983; Trakman, 1983). A sampling of the growing literature is reproduced in Stringham (2007), and Powell and Stringham (2009, pp. 17–41) offer a review of much of it. Fink (2012) also reviews some of the relevant literature. There is an extensive anthropological literature on customary law, of course, some of which is cited below.

<sup>8</sup> *Pashtunwali*, including some of the provisions of law discussed here, has also recently attracted attention, but from a normative perspective with authors considering ways to reduce the level of violence and improve treatment of women (e.g., Ginsburg, 2011; Wexler, 2011).

<sup>9</sup> In particular, valuable information regarding *Pashtunwali* resulted from detailed interviews a member of a family of tribal elders in the *Mohmand* tribe—one of the largest tribes in FATA.

Download English Version:

<https://daneshyari.com/en/article/5085696>

Download Persian Version:

<https://daneshyari.com/article/5085696>

[Daneshyari.com](https://daneshyari.com)